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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,
v.

FIRST SECURITY BANK OF UTAH, N.A., Personal Representative of the Estate of Velma Rife Jones; FIRST SECURITY BANK OF ROCK SPRINGS, Resident Personal Representative of the Estate of Velma Rife Jones; ROCK SPRINGS GRAZING ASSOCIATION; LAZY VD LAND AND LIVESTOCK; ELIZA EVERSOLE; and LOIS M. EVERSOLE,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Wyoming

BRIEF AMICI CURIAE OF AMERICAN COUNCIL ON
EDUCATION, AMERICAN HOSPITAL ASSOCIATION,
ASSOCIATION OF AMERICAN UNIVERSITIES,
ASSOCIATION OF JESUIT COLLEGES AND
UNIVERSITIES, COUNCIL FOR ADVANCEMENT AND
SUPPORT OF EDUCATION, NATIONAL ASSOCIATION
FOR HOSPITAL DEVELOPMENT, NATIONAL
COMMITTEE ON PLANNED GIVING, NATIONAL
INSTITUTE OF INDEPENDENT COLLEGES AND
UNIVERSITIES, NATIONAL MASONIC FOUNDATION
FOR PREVENTION OF DRUG AND ALCOHOL ABUSE
AMONG CHILDREN, AND NATIONAL SOCIETY OF
FUNDRAISING EXECUTIVES, IN SUPPORT
OF THE PETITIONER

BRUCE R. HOPKINS *

ELYSE I. SUMMERS

STEPTOE & JOHNSON

1330 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 429-3000

Attorneys for Amici Curiae

* Counsel of Record

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment guarantees a trust beneficiary notice of a judicial proceeding held to approve the sale of property obligated to the trust in which the beneficiary has a vested remainder interest.

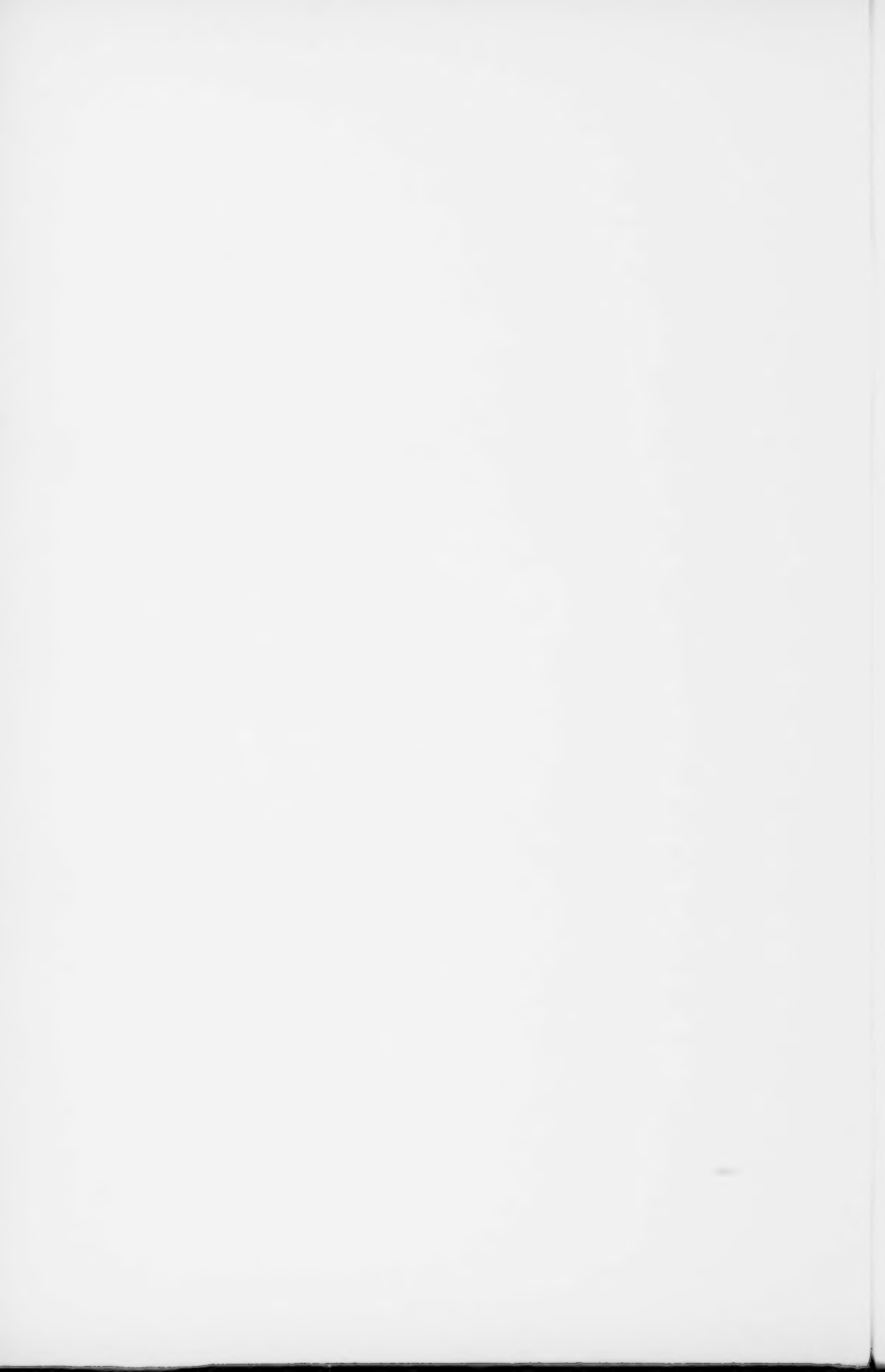


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OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE*

This brief *amici curiae* is filed by the organizations described below, with consent of all parties, as provided for in the rules of this Court.

The American Council on Education, an independent, nonprofit association founded in 1918, represents approximately 1,500 accredited, degree-granting institutions of higher education as well as national and regional higher education associations. Through its programs and activities, and its policy-setting functions, it strives to ensure quality education on the nation's campuses and equal educational opportunity for all Americans.

The American Hospital Association is an nonprofit, national trade association of hospitals whose mission is to promote the public welfare through leadership and assistance to its members in the provision of high quality health care and services. With approximately 5,500 institutional members, it represents a majority of the nation's acute care hospitals.

The Association of American Universities is a nonprofit association, founded in 1900, which represents fifty-six American and two Canadian universities with strong programs of graduate and professional education and research. Approximately half are public institutions and half are private. The Association serves its member institutions through activities designed to encourage timely consideration of major issues affecting academic research and graduate and professional education.

The Association of Jesuit Colleges and Universities is a nonprofit association, established in 1970, which represents the twenty-eight Jesuit colleges and universities in the United States. Through its programs and activities, the Association strives to ensure the quality of education at our nation's Jesuit institutions of higher education.

The Council for Advancement and Support of Education was founded in 1974 through the merger of the American Alumni Council and the American College Public Relations Association. Its membership includes approximately 3,200 colleges, universities, independent elementary and secondary schools, Educational Associates, and Subscribers in the United States, Canada, Mexico, and eighteen other countries. Representing the member institutions are more than 14,000 individual professionals in institutional advancement.

The National Association for Hospital Development is a nonprofit association, founded in 1967, which has as its membership over 2,300 development officers, representing both not-for-profit and for-profit hospitals and hospital medical centers throughout the United States.

The National Committee on Planned Giving is a nonprofit, national professional association of individuals who are interested in the planned giving field. Its membership is composed of planned giving councils of fifteen or more individuals organized throughout the United States. Its current membership includes thirty-nine member councils, which serve approximately 3,500 local members. The Committee engages in a variety of activities, including an active program to encourage the participation in the gift planning process of individuals in professions other than fundraising.

The National Institute of Independent Colleges and Universities is a nonprofit association founded in 1976 to represent the national policy concerns of independent colleges and universities. Presently, Institute members include more than 850 independent colleges and universities, and more than 40 state-based associations. The Institute conducts research and policy studies on matters of concern to independent higher education.

The National Masonic Foundation for Prevention of Drug and Alcohol Abuse Among Children is a nonprofit, tax-exempt organization devoted to the promotion of greater awareness and prevention of drug and alcohol abuse among America's youth. Its activities focus on funding and sponsoring educational programs to reduce drug and alcohol abuse, including publications, electronic media, and special programs. It is a sponsored charity of the Masonic Grand Lodges nationally, and receives support from charitable remainder gifts from members of the Lodges.

The National Society of Fundraising Executives is a nonprofit association, founded in 1960, which represents over 12,000 professionals engaged in the raising of funds for charitable organizations. The Society represents individual fundraising executives who are employed by charitable organizations as well as those who are professional consultants to charitable organizations. The Society engages in a variety of activities, including the promotion of educational seminars for its membership and the operation of a certification program for fundraising executives.

All of the above-named organizations are concerned with promoting charitable giving, including bequests. Charitable remainder trusts and similar instrumentalities are an important element of charitable giving. In the experience of the organizations named above, without the timely and appropriate notification necessary to protect their interests in trusts (through participation in legal proceedings related to such trusts), charitable beneficiaries of charitable remainder trusts frequently cannot ascertain and protect their vested interests, and experience substantial diminution of such interests.

STATEMENT OF THE CASE

Amici curiae adopt the Petitioner's statement of the case.

REASONS FOR GRANTING THE PETITION

I. CHARITIES' FAILURE TO RECEIVE NOTICE OF THE DISPOSITION OF ASSETS OF CHARITABLE REMAINDER TRUSTS OF WHICH THEY ARE BENEFICIARIES CAUSES A MAJOR DISRUPTION IN THEIR ABILITY TO RAISE, MANAGE AND MAINTAIN FUNDS

The instant case presents a constitutional issue that is of great importance to charities that receive financial support in the form of charitable remainder trusts. These split-interest trusts, which frequently are testamentary, generally provide "for a specified distribution, at least annually, to one or more beneficiaries, at least one of which is not a charity, for life or for a term of years, with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity." Treas. Reg. § 1.664.1 (1989). The grantor is free to name any independent person or entity as trustee, and often the trustee is the executor of the trustor's estate, a bank or trust company, or other person apart from the charitable beneficiaries.

Bequests in the form of split-interest gifts constitute one of the primary sources of funds for charities of all types. Statistics compiled by the U.S. Department of Education and the Council for Aid to Education indicate that the assets of charitable remainder trusts managed by major colleges and universities approximated \$2.3 billion in fiscal year 1988.¹ A study by the Council for Aid to Education estimates that about 5.9 percent

¹ The total as of fiscal 1986 was derived from National Center for Education Statistics, *Financial Statistics of Institutions of Higher Education*, Table 5 (1987). The additions for fiscal 1987 and 1988 are reported in Council for Aid to Education, *Voluntary Support for Education 1987-1988*, at 7-8 (June 1989). The totals are understated since they do not include the many trusts managed by noncharitable trustees, nor do they include trusts unknown to the charities. There is a slight overstatement in the data to the extent that they include a small amount of gift annuities.

of all gifts to major private schools are in the form of charitable remainder gifts.²

Other types of charitable organizations, including hospitals and major hospital systems, rely heavily on charitable donations. Charitable giving in fiscal 1987-1988 to member hospitals of the National Association for Hospital Development (NAHD) totaled \$2.89 billion, up more than 4 percent from the previous year.³ While no specific figures regarding split-interest trusts are available for non-educational institutions, these trusts are a considerable source of charitable funds donated to hospitals. For example, Shriners Hospitals reports that it has interests in over 2,300 trusts of which it is aware, with its share of assets totaling approximately \$70 million.⁴

For some institutions, charitable remainder trusts provide the single most significant source of charitable funds. For example, Dartmouth University reports that split-interest charitable trusts constitute about 25 percent of all bequests received since 1951. Harvard University received over \$95 million in split-interest gifts in fiscal year 1988-1989 alone.⁵ Even for those institutions that

² Council for Aid to Education, *Voluntary Support of Education 1987-1988*, at 7 (June 1989). The estimate also includes a small number of gift annuities which are not in trust.

³ National Association for Hospital Development, *Report on Giving, FY 1988*, at 1 (1989). These figures represent the annual giving to all NAHD hospitals in the United States and were extrapolated from responses to a member survey conducted by NAHD. This total includes cash donations, non-cash gifts, pledges and planned giving.

⁴ Petition at 25. The Baylor University Medical Center Foundation estimates its interests in trusts of this kind are approximately \$70 million as well. Telephone conversation with Gordon Caswell, President, Baylor University Medical Center Foundation (April 30, 1990).

⁵ Financial Report to the Board of Overseers of Harvard College for the Fiscal Year 1988-1989, at 81 (1989).

do not rely as heavily on split-interest gifts as Dartmouth and Harvard Universities, charitable giving is becoming increasingly important. In an era of cuts in governmental spending, both educational and health care institutions have a greater need for philanthropic dollars. A recent report by the National Science Foundation indicates that colleges and universities are deferring \$2.50 of needed construction for every \$1.00 of planned expenditures.⁶ For hospitals, many of the sources of funding for capital-intensive endeavors have entirely evaporated or been greatly reduced,⁷ forcing hospitals to rely more heavily on charitable giving in order to carry out basic hospital functions.⁸

Given the enormous amounts of money involved in these trusts and the increasing financial pressure on

⁶ Statement by Joe B. Wyatt, Chancellor, Vanderbilt University, on behalf of the American Council on Education, before the Committee on Ways and Means, U.S. House of Representatives, at 8 (March 5, 1990).

⁷ The Hill-Burton program, once a major source of funding for hospital expansion and modernization, is no longer a significant factor. See Note, *The Hill-Burton Act, 1946-1980: Asynchrony in the Delivery of Health Care to the Poor*, 39 Md. L. Rev. 316, 346 (1979). Average patient operating margins under the Medicare Prospective Payment System continue to hover precariously low. As a result, the ratio of hospital bond downgradings far exceed upgradings, Standard & Poor's Health-Care Revenue Bonds Credit Review (April 18, 1988), making it difficult for hospitals to finance needed improvements. Furthermore, Medicare capital payments to hospitals have been reduced by 15 percent for rural and urban hospitals, Omnibus Budget Reconciliation Act of 1989, P.L. No. 101-239, § 6002, 103 Stat. 2106, 2140 (1989), and an additional 10 percent reduction for urban hospitals has been proposed. U.S. Dept. of Health and Human Services, *The Fiscal Year 1991 Budget* at 46-47.

⁸ American Hospital Association, Policy and Statement: *Hospital Philanthropy* (August 6, 1986). The NAHD's *Report on Giving, FY 1988* indicates that the three highest categories for expenditures of charitable giving were construction and renovation, research and teaching, and equipment. *Id.* at 6.

charities, it is imperative that the Court require trustees to notify charitable remainder beneficiaries of proposed sales and investment decisions that substantially affect their interests. Charities are frequently not notified of the existence of a charitable remainder trust until after the last income beneficiary dies, which can be years after the death of the grantor and years after the disposition of substantial trust assets.

The lack of timely and adequate notice has a severe adverse effect on charities. Neither the probate courts nor the state attorneys general have the staff or the time to supervise these trusts. Life beneficiaries receive notice of the trust no later than their receipt of the first income distributions, and these individuals often place tremendous pressure on trustees to administer the trusts in ways that will favor their income interests at the expense of the remaindermen. This situation is akin to the prohibition on *ex parte* communications during the pendency of a lawsuit. Whether the life beneficiaries' requests are appropriate and consistent with the intent of the grantor are questions that are best considered under the vigilant eye of all parties having an interest in the assets of the trust.

This Court has traditionally been sensitive to the problems of charities in raising funds and has, in light of their unique contribution to American society, consistently and conscientiously provided charities their due constitutional protection. See, e.g., *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). In the case before the Court, the very ability of charities to raise, manage and maintain funds is at risk as a result of the lower court's opinion, and it is therefore necessary and proper for this Court to set forth the rights of charitable remainder beneficiaries under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

II. THE LOWER COURT'S OPINION CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND CONFLICTS WITH DECISIONS OF THIS COURT AND OF LOWER COURTS

In a series of cases, this Court has established that "state action affecting property must generally be accompanied by notification of that action: 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484 (1988) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). See also *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983)). The opinion of the lower court contravenes the procedural due process requirement of the Federal Constitution and is in direct conflict with the rulings of this Court in *Tulsa Professional Collection Services*, *Mullane*, and *Mennonite Board of Missions*.

The Wyoming Supreme Court deprived Shriners Hospitals of all notice and hearing rights because it interpreted the statutory notice provisions requiring notice to "beneficiaries named in the will" to exclude beneficiaries of a testamentary trust created by the will. *Estate of Jones*, 782 P.2d 229 (Wyo. Sup. Ct. 1989). This distinction is all form and no substance. The Wyoming Supreme Court denied the right to notice to the main beneficiaries of the estate simply because the will placed their interests in trust, while relatively minor general or specific legatees of small cash bequests were determined to be entitled to full notice and hearing rights. In reaching this conclusion, the Wyoming Supreme Court majority implicitly determined that the due process rights of Shriners Hospitals were not violated. It should have realized that its determination that Shriners Hospitals was not a beneficiary named in the will was an insufficient

reason for denying notice to the charitable remaindermen.

In *Tulsa Professional Collection Services* the probate court attempted to truncate the right to notice and hearing on the claims of creditors of the estate by means of an artificially short statute of limitations. This Court held that the creditors' rights to notice and hearing superseded the probate statute of limitations, reaffirming the principle that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of *any* party . . . if its name and address are reasonably ascertainable." *Id.*, 485 U.S. at 485 (quoting *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983)) (emphasis in original). The creditors in *Tulsa Professional Collection Services* were not beneficiaries named in the will, but nonetheless were deemed to hold protected constitutional interests in the property of the estate. Whether or not charitable remaindermen are "beneficiaries named in the will," therefore, is irrelevant to a determination of whether they are entitled to notice of judicial proceedings affecting their interests in trust.

Nor is the fact that Shriners Hospitals was a remainderman significant for due process purposes. In *Mullane*, the trustee of a common trust fund petitioned for a judicial settlement of accounts. The only notice of the petition given beneficiaries, both known and unknown, was by publication. This Court set aside the lower court's approval of the accounts, holding that notice by publication "is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving persons whose whereabouts are also known of substantial property rights." *Id.*, 339 U.S. at 320.

In *dicta*, this Court suggested that it might not be necessary under the Due Process Clause to give personal notice to beneficiaries with future interests. *Id.* at 317. This suggestion, however, was in the context of a dis-

cussion of beneficiaries whose interests were "conjectural" or "so remote as to be ephemeral." *Id.* Although the interests of the charitable remaindermen are, by definition, future, they clearly are not conjectural or ephemeral.⁹ Moreover, unlike *Mullane*, where there were numerous beneficiaries, here there were three vested beneficiaries. Any distinction entitling income beneficiaries but not charitable remaindermen to personal notice is constitutionally suspect, especially because the remaindermen often have a greater financial interest in the trust. The general reasoning of *Mullane*, that personal notice must be given to persons whose interests and whereabouts are known or reasonably ascertainable, is equally applicable to both income beneficiaries and charitable remaindermen. The *Mullane* opinion plainly requires that charitable remaindermen be notified of judicial proceedings that might have a substantial impact on their interests in trusts.

Furthermore, in *Mullane*, this Court rejected the contention that notice to a trustee is necessarily sufficient to protect the due process rights of trust beneficiaries. To the contrary, this Court recognized that where the trustee's interests were adverse to those of the beneficiaries, personal notice to known and reasonably ascertainable beneficiaries was required. *Id.* at 316-17. In the case before the Court, First Security Bank of Utah was both personal representative and trustee, and it would have been impracticable for it to adequately represent the special interests of the remainder beneficiaries of the trust, while at the same time representing the income beneficiary and all the other beneficiaries of the will.

⁹ Under the Internal Revenue Code of 1986, as amended, tax deductions are allowed when the remainder interest of a charity is real and capable of reasonable valuation on the effective date of the creation of a trust (in the case of a testamentary trust, the date of death). 26 U.S.C. §§ 664, 2055; Treas. Reg. § 1.664-1 *et seq.* The concreteness of Shriners Hospitals' interest is evidenced by the fact that a tax deduction was claimed on the death of the grantor. Petition at 3, n.2.

The opinion of the court below is also in conflict with decisions of other state appellate courts that have considered the issue in light of *Mullane*. In *Estate of Reed*, 259 Cal. App. 2d 14, 66 Cal. Rptr. 193 (1968), the court held that the charitable beneficiaries of a testamentary trust must be given notice by mail of all judicial proceedings affecting their interests. The court specifically stated that notice to the bank serving as both trustee and executor was not binding on the charitable beneficiaries. According to the court, "when the rights of beneficiaries to a trust are inevitably affected, they are entitled to notice and are indispensable parties. . . . '[A] judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others.'" *Id.* at 198 (quoting *Bank of California v. Superior Court*, 16 Cal.2d 516, 521, 106 P.2d 879 (1940)). This principle was affirmed as to remaindermen of testamentary trusts in *Estate of Lacy*, 54 Cal. App. 3d 172, 126 Cal. Rptr. 432 (1975).

CONCLUSION

As this brief *amici curiae* demonstrates, charities have clear, valuable, economic interests in the assets of split-interest trusts, which they must be entitled to protect through receipt of timely, written notice. Because the Wyoming Supreme Court's decision does not provide for notice to charitable remaindermen, it violates the Due Process Clause of the Fourteenth Amendment. For this reason, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRUCE R. HOPKINS *

ELYSE I. SUMMERS

STEPTOE & JOHNSON

1330 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 429-3000

Attorneys for Amici Curiae

* Counsel of Record

